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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re	)	In Proceedings Under
	)	Chapter Thirteen
PETER TADDEO	)	
	)	
and	)	
	)	Case No. 09-03451 EWH
SHARON TADDEO	)	
	)	Adv. No. 00-00077
Debtors.	)	
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PETER TADDEO and	)	
SHARON TADDEO	)	COMPLAINT TO DETERMINE
	)	SECURED STATUS
Plaintiffs,	)	AND AVOID LIEN
vs.	)	ON REAL PROPERTY
	)	
BANK OF AMERICA	)	
	)	
Defendant.	)	
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COME NOW, PETER TADDEO and SHARON TADDEO, Plaintiff Debtors (hereinafter Plaintiffs or Debtors) by and through counsel undersigned, who file this complaint to avoid defendant's lien on real property.

The Plaintiff's allege that this Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 U.S.C. §§1344 and 157(b)(2). This matter is a core proceeding.

**FACTS**

Debtors filed their chapter thirteen proceeding on February 27, 2009.

The Debtors have proposed a plan of reorganization.

BANK OF AMERICA is a corporation licensed to do business in Arizona, whose main office is in Charlotte, NC, that may be served with Summons and Complaint through its Arizona Registered

1 Agent, C T Corporation System, 2394 E Camelback Rd, Phoenix, Az 85016.

2 Debtors are the owners of a piece of real property which the Debtors have claimed as their  
3 homestead exemption for their primary residence

4 LOT 62, BLOCK 10 GLADDEN FARMS

5 a.k.a. 11526 W. Stone Mound Dr., Marana, Arizona 85653

6 Debtors valued their primary residence at \$165,000.00 in Schedule A of their bankruptcy  
7 proceeding.

8 The holder of the first lien on debtors residence is CITIMORTGAGE, and the amount owed  
9 to it is \$266,236.33 pursuant to its proof of claim, on file in this case and listed in the Court Claims  
10 Registry as Claim #18, attached hereto as Exhibit A. The Note and Deed of Trust upon which  
11 CITIMORTGAGE is based was entered into on July 20, 2005, and its Deed of Trust was recorded  
12 on August 25, 2005 at the Pima County Recorder (docket 12624 page 4555, and is attached hereto  
13 as Exhibit B).

14 The holder of the second lien on debtors residence is BANK OF AMERICA, and the amount  
15 owed to it is \$49,317.35 pursuant to its statement, attached hereto as Exhibit C. The Note and Deed  
16 of Trust upon which BANK OF AMERICA is based was entered into approximately September  
17 2006, and its Deed of Trust was recorded on September 29, 2006 at the Pima County Recorder  
18 (docket 12900 page 3673).

## 19 **ISSUES**

20 Can a Chapter 13 Debtor extinguish a purported lien on their residence and obtain a ruling  
21 that the lienholder has no "allowed secured claim" under 11 U.S.C. §506(a), despite the  
22 antimodification provisions of §1322(b)(2)?

23 Plaintiffs have had their residence appraised. The actual value of the Debtors property is  
24 \$165,000.00. A copy of said appraisal is attached hereto as Exhibit D. The value of the Plaintiff's  
25 residence is less than the amount owed on the first lien to CITIMORTGAGE.

26 Defendant holds a junior lien on the Plaintiffs residence. The value of the Plaintiff's residence  
27 after deducting the amount owed on the first lien, does not leave any value to provide Defendant even  
28 one dollar's worth of interest in the Property. Based on the definition of "allowed secured claim"

1 derived from 11 U.S.C. §506(a) and (d); and pursuant to the modification provisions allowed under  
2 11 U.S.C. §1322(b)(2), Plaintiffs ask for Judgment extinguishing Defendant's lien on their property.

3 **MEMORANDUM OF AUTHORITY**

4 The Ninth Circuit along with other courts have all adopted the view that the holder of a  
5 purported junior lien on a Debtors residence is wholly unsecured and not entitled to the protection  
6 of §1322(b)(2), when the value of that residence is less than, or equal to the amount owed on  
7 superior liens. In re Zimmer, 313 F.3d 1220 (9<sup>th</sup> Cir. 2002); In re Lane, 280 F.3d 663, 667-69 (6<sup>th</sup>  
8 Cir. 2002); Pond v. Farm Specialist Realty (In re Pond), 252 F.3d 122, 126 (2d Cir. 2001); Tanner  
9 v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357, 1359-60 (11<sup>th</sup> Cir. 2000); In re McDonald 205  
10 F.3d 606 (3<sup>rd</sup> Cir. 2000).

11 WHEREFORE, the Plaintiffs respectfully request the Court to:

12 a. Determine that the Defendant has no secured interest for the loan on the second deed of  
13 trust on the residential property;

14 b. Order the Defendant to release the second mortgage lien on the residential real property  
15 of the debtors pursuant of 11 U.S.C. §506(d), immediately upon the entry of the Discharge Order and  
16 deliver the same to the attorney for the Debtors within 20 days from the date of the entry of said  
17 order at no charge or fee for the aforesaid cancellation and delivery;

18 c. Direct the Trustee that any timely filed proof of claim filed by the Defendant for the second  
19 mortgage lien be treated as an unsecured claim under the plan;

20 d. That each party bear their own costs in relation to this action;

21 e. For such other and further relief as this Court deems just and proper.

22 DATED this 13<sup>th</sup> day of January, 2010.

23  
24 FARNSWORTH MORTENSEN LAW OFFICES

25  
26 /s/Wayne B. Mortensen  
27 Wayne B. Mortensen (#18519)  
28 Attorney for Debtors